

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL SCOTT TIMMERS,

Defendant-Appellant.

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UNPUBLISHED

October 12, 2006

No. 261604

Mecosta Circuit Court

LC No. 04-005376-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of kidnapping, MCL 750.349, first-degree criminal sexual conduct (CSC I), MCL 750.520b, assault with intent to commit murder, MCL 750.83, and attempted murder, MCL 750.91. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison sentences of 62 and one-half years to 95 years for kidnapping, 47 and one-half years to 95 years for CSC I, 62 and one-half years to 95 years for assault with intent to commit murder, and 62 and one-half years to 95 years for attempted murder. We affirm.

Testimony at trial established that the complainant was a ninth grade special education student when she was abducted while walking home from a bus stop. The complainant was taken by her assailant to a vacant home, where he tied her up with an extension cord and strangled her with both hands, to a point such that she was unable to breathe. The assailant then drove the complainant to another location, where he raped her in the back seat of the car, after which he drove to a steep embankment, wrapped her ankles and wrists with black electrical tape, and pushed her over the side. The complainant testified that she was able to stop herself from sliding all the way to the bottom by grabbing a tree branch with her teeth, and that her cries for help were heard by an area resident who was outside shoveling his driveway. The complainant identified defendant in a lineup and in court as her assailant.

On appeal, defendant argues that the trial court erred by admitting evidence that linked defendant to the theft of a Jeep Cherokee, which he was allegedly driving when he committed the offenses, as well as by admitting evidence of the theft of another vehicle, the contents of the two vehicles, and several other items, including a snowmobile trailer and a license plate. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). Error in the admission of evidence, including bad acts evidence, does not require reversal unless it affirmatively appears more likely than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Pursuant to MRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule provides a nonexclusive list of permissible purposes for which prior wrongs can be admitted, including "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." *Id.* In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), the Court set forth the following three-step inquiry to determine whether evidence is admissible under MRE 404(b): (1) the prosecutor must offer the other acts evidence for a proper purpose, i.e., not under a character or propensity theory; (2) the evidence must be relevant under MRE 402; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice under MRE 403. Finally, if the evidence is found admissible, the trial court may, if requested, provide a limiting instruction to the jury. *Id.* at 75.

Accordingly, where the only relevance of the proposed evidence is to show the defendant's character or propensity to commit the crime, the evidence must be excluded. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). If, on the other hand, the evidence tends to prove some fact other than character, its admissibility depends on whether its probative value is substantially outweighed by its prejudicial effect, "taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence." *Id.*

Defendant argues that, because there were witnesses who could place him in the Jeep before and after the date of the offenses, it was unnecessary to introduce evidence that the Jeep was stolen. Defendant further notes that he stipulated that he was in the Jeep and in the area where the crimes were committed during the time period in question and therefore, the evidence that defendant was responsible for these other crimes could only be relevant to show his propensity to commit crimes, an impermissible purpose under MRE 404(b).

The prosecution articulated a proper, noncharacter purpose for admission of defendant's various acts of theft, i.e., proving the identity of the perpetrator and the vehicle used in committing the crimes, thus satisfying the first prong of the *VanderVliet* inquiry. See *Crawford*, *supra* at 385-386. As we will explain, because the evidence was relevant for this purpose and its probative value was not substantially outweighed by its prejudicial effect, we conclude that the trial court did not abuse its discretion by admitting it. See *Watson*, *supra* at 577.

The other acts evidence introduced at trial included testimony that linked defendant to the theft of a Ford Explorer, a Jeep Cherokee, the contents of those vehicles, a snowmobile trailer, and items from another vehicle. At trial, defendant challenged the prosecution theory that defendant was the perpetrator and that the crimes were committed in the Jeep Cherokee, stating in his opening argument that "they have identified the wrong man and the wrong car." In

particular, defendant emphasized that the complainant described the vehicle used during her abduction as a “Trailblazer” rather than a Jeep Cherokee.

The complainant identified various items that were in the vehicle that defendant was driving as well as items used in the commission of the crime, including a tow chain. Testimony that these items were in the vehicles before they were stolen therefore supported the prosecution’s theory that the crime was committed in the Jeep and that the complainant merely used the word “Trailblazer” to indicate the vehicle was an SUV. For example, the owner of the stolen Ford Explorer testified that one of the items in her car was a pair of fingerless gloves that were similar to the gloves that the complainant testified defendant wore during the assault. Testimony from the owner of the Jeep Cherokee about items that were in the vehicle when it was stolen and when it was eventually returned to her tended to corroborate the complainant’s testimony regarding items that were in the vehicle used during her abduction and sexual assault. Further, testimony that some of the items were not in the Jeep Cherokee when it was returned to its owner permitted the jury to infer that the person who stole the vehicle removed some items from the vehicle before it was recovered, thereby, undercutting the force of defendant’s argument that the complainant must not have been in the Jeep Cherokee because her personal belongings such as her scarf and snow pants, were not found there. Therefore, evidence regarding the thefts related to defendant’s identity as the perpetrator and was relevant to an issue other than character or propensity. See *People v Pointer*, 133 Mich App 313, 315; 349 NW2d 174 (1984).

Defendant further argues that any probative value of the evidence was substantially outweighed by its prejudicial effect because it suggested that defendant was a man of bad character who was predisposed to committing crimes. However, the evidence of these thefts was relatively minor compared to the magnitude of the crimes with which defendant was charged. See *People v Werner*, 254 Mich App 528, 540; 659 NW2d 688 (2002). We are not persuaded that any prejudice caused by evidence that defendant engaged in larceny and vehicle theft introduced for purposes of proving defendant’s identity as complainants assailant, would substantially outweigh the probative value of this evidence in proving that defendant committed the crimes of kidnapping, sexual assault, and attempted murder.

Moreover, at defendant’s request, the trial court gave a limiting instruction several times, indicating that the evidence was to be used only to identify defendant and the vehicle and not to infer that he had a bad character. This Court has held that such an instruction may mitigate any prejudicial effect of the other acts testimony and protect the defendant’s right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Therefore, we conclude that evidence of defendant’s acts of theft was relevant for the permissible purpose of proving the identity of defendant and the vehicle used in the commission of the crime. Further, the probative value of this evidence was not substantially outweighed by its prejudicial effect.

Finally, any error in admitting this evidence was harmless in light of the overwhelming evidence of defendant’s guilt. See *Watson*, *supra* at 572. An evidentiary error is not a basis for reversal “‘unless it is more probable than not that the error was outcome determinative.’” *Id.*, quoting *People v Lukity*, 460 Mich 484, 496; 595 NW2d 607 (1999). The complainant, although she had difficulty remembering certain details of the assault, was able to identify defendant in a

lineup and testified in court that she was sure that he was the perpetrator. Further, she told her rescuers and investigators that the person who attacked her was named Scott, which is the name used by defendant to identify himself. Finally, there was forensic evidence linking defendant to the crime, including mitochondrial DNA evidence indicating that a foreign hair recovered from the complainant's underwear belonged to defendant. Defendant's fingerprint was also found on a piece of the black electrical tape that was wrapped around the complainant's wrists and ankles.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Deborah A. Servitto